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IN THE
COURT OF APPEALS OF INDIANA

ERIC CRAWFORD,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0611-CR-993
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Linda E. Brown, Judge
Cause No. 49F10-0605-CM-92161

June 4, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Eric Crawford ("Crawford") appeals his conviction for Criminal Mischief as a Class A misdemeanor[1] and the trial court's restitution order. We affirm the conviction but remand for revision of the restitution order.

Issues

Crawford presents two issues for our review:

1. Whether the evidence is sufficient to sustain his conviction; and

2. Whether the trial court improperly ordered payment of $1,755.69 in restitution without conducting a hearing to determine his ability to pay.

Facts and Procedural History

The facts favorable to the judgment follow.[2] While Angela Crawford ("Angela") was in the process of divorcing Crawford, she was living with her sister and brother-in-law, Gail and Michael Scott ("Gail" and "Michael," respectively). On April 8, 2006, Angela was "out drinking" with a former husband and his girlfriend, Robin Miller ("Miller"). (Tr. 32.) Crawford called Angela's cell phone numerous times, but Angela refused to answer the phone because she knew he was calling. Instead, Miller answered, which upset Crawford.

Around 2:30 or 2:45 a.m. on April 9, 2006, Crawford called for the last time. Miller again answered the phone. When Crawford asked if Miller knew where Angela was, Miller

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[1] Ind. Code § 35-43-1-2.

[2] We remind counsel for appellant that the Statement of Facts "shall be in narrative form and shall not be a witness by witness summary of the testimony." Ind. Appellate Rule 46(A)(6)(c). Additionally, the facts "shall be stated in accordance with the standard of review appropriate to the judgment or order being appealed." App. R. 46(A)(6)(b).

answered, "[D]on't worry about it." (Tr. 23.) Crawford instructed Miller to advise Angela to call Gail and ask her about the $3,000 worth of damage he had just done to her car. Miller relayed the message to Angela, who called her sister at about 4:00 a.m.

Michael then examined his 2006 Buick Rendezvous, which was parked in his driveway. He had owned the vehicle for about two months and, previous to that time, it had been in "[p]erfect condition." (Tr. 7.) Michael saw some rocks at the back of the Buick. He pulled the vehicle into the garage and noticed damage to the passenger side door and hood. Specifically, there were "pretty deep" scratches on the top, a large dent to the top of the door, a dent on the inside, and scratches on the bottom of the door panel. (Tr. 8.) Michael also found small pieces of rock on the top of the car. Police investigated and concluded it was "very possible" that rocks caused the damage. (Tr. 30.) Total damages were $1,755.69, of which Michael paid the $250.00 insurance deductible.

The State charged Crawford with Class A misdemeanor criminal mischief. Following a bench trial, Crawford was found guilty and sentenced to 365 days, with 304 days suspended. The court also ordered Crawford to pay restitution to Michael in the amount of $1,755.69. Crawford filed a Motion to Reconsider Sentencing that, in part, challenged the restitution order on the basis that it gave Michael a "windfall." (App. 27.) The court denied the motion, and this appeal ensued.

Discussion and Decision

I. Sufficiency of the Evidence

Crawford first contends that the evidence is insufficient to sustain his criminal

mischief conviction. Upon review of such claims, we neither reweigh the evidence nor assess witness credibility. Cowan v. State, 783 N.E.2d 1270, 1278 (Ind. Ct. App. 2003), trans. denied. We consider only the evidence most favorable to the judgment, along with all reasonable inferences that can be drawn therefrom. Id. If a reasonable trier of fact could have found the defendant guilty based on the probative evidence and reasonable inferences drawn therefrom, the conviction will be affirmed. Id.

A person commits criminal mischief when he recklessly, knowingly, or intentionally damages or defaces the property of another person without the other person's consent. Ind. Code § 35-43-1-2(a)(1). The offense is a Class A misdemeanor when the damage is between $250.00 and $2,500.00. I.C. § 35-43-1-2(a)(2)(A)(1).

Crawford alleges that "[t]he only evidence" of his guilt was Michael's "naked testimony," and he raises the "incredible dubiosity" rule. Appellant's Br. at 6. Under that principle, when a sole witness presents inherently improbable testimony and there is a complete lack of circumstantial evidence, a defendant's conviction may be reversed. Herron v. State, 808 N.E.2d 172, 176 (Ind. Ct. App. 2004), trans. denied. Application of the rule is rare; the standard to be applied is whether the testimony is so incredibly dubious or inherently improbable that no reasonable person could believe it. Id.

Here, Michael's testimony is corroborated. Police investigated the incident and determined that rocks found nearby could have caused the dents and scratches on Michael's vehicle. Further, Miller testified that Crawford asked her to tell Angela to call her sister about the $3,000 worth of damage he had done to her car. We cannot say that the testimony

in this case is wholly uncorroborated or so incredibly dubious that no reasonable person could believe it. On the contrary, from the evidence presented, the trial court could reasonably have concluded that Crawford was guilty of criminal mischief.

II. Restitution

Next, Crawford asserts that the court erred when it ordered him to pay $1,755.69 in restitution without conducting a hearing to determine his ability to pay. It is true that, when restitution is ordered as a condition of probation or a suspended sentence, the trial court must inquire into the defendant's ability to pay so that indigent defendants are not imprisoned because of their inability to pay. Ladd v. State, 710 N.E.2d 188, 192 (Ind. Ct. App. 1999). But when restitution is ordered as part of an executed sentence, an inquiry into the defendant's ability to pay is not required. Id. In that situation, restitution is merely a money judgment, and a defendant cannot be imprisoned for nonpayment. Id.

Crawford does not claim that restitution was ordered as a condition of probation or a suspended sentence. And the trial court stated that the restitution order was one for "civil judgment" to be collected "through a civil court." (Tr. 51-52.) "It is well-established that an individual cannot be imprisoned for failing to pay a money judgment." Bittner v. State, 546 N.E.2d 117, 121 (Ind. Ct. App. 1989). Crawford has not shown that he faced the risk of imprisonment due to a failure to pay restitution and, thus, that the trial court was required to conduct a hearing to determine his ability to pay.

Crawford also makes a three-sentence argument that restitution to Michael in the amount of $1,755.69 is improper, as Michael's out-of-pocket cost was merely $250.00.

Crawford seeks reversal of his conviction due to the alleged error.

Ordinarily, we would deem this argument waived, as unsupported by cogent reasoning and citation to authority. See Ind. Appellate Rule 46(8)(a); Lyles v. State, 834 N.E.2d 1035, 1050 (Ind. Ct. App. 2005), reh'g denied, trans. denied. However, "[a]n improper sentence constitutes fundamental error and cannot be ignored on review." Johnson v. State, 845 N.E.2d 147, 153-54 (Ind. Ct. App. 2006) (considering error in restitution order as fundamental), reh'g denied, trans. denied. Thus, we review the alleged claim of error.

Indiana Code Section 35-50-5-3(a)(1) requires that a restitution order based on property damages reflect the victim's actual cost. Shane v. State, 769 N.E.2d 1195, 1201 (Ind. Ct. App. 2002). Crawford correctly points out that Michael's actual cost was $250.00, the insurance deductible. That does not mean, however, that Crawford's conviction must be reversed; nor does it mean that the total restitution calculation is incorrect. Michael's insurance company paid the balance of the repair cost. An insurance company can be a "victim" under the statute. See Henderson v. State, 848 N.E.2d 341, 346 (Ind. Ct. App. 2006); Little v. State, 839 N.E.2d 807, 810 (Ind. Ct. App. 2005). As far as we can discern, the trial court correctly computed the total amount of damages, but did not properly allocate those damages. See Haltom v. State, 832 N.E.2d 969, 974 (Ind. 2005) (Shepard, J., dissenting) (acknowledging that, in scenario where actual damages were $80,000, and the insurance carrier paid $80,000, and the criminal court ordered restitution of $27,000, it would be the insurance carrier who should receive the restitution.) Accordingly, we affirm the restitution order as to the amount of restitution but remand for proper allocation of restitution

between the victims of this crime.

Affirmed but remanded for restitution allocation.

SHARPNACK, J., and MAY, J., concur.